Neutral Citation Number: [2023] EWCA Civ 440

Case No: CA-2022-001000 & CA-2022-001002

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Robin Knowles CBE
[2022] EWHC 357 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/04/2023

Before:

LORD JUSTICE MALES
LORD JUSTICE SNOWDEN
and
SIR LAUNCELOT HENDERSON

- -

Between:

FLOREAT INVESTMENT MANAGEMENT LIMITED	**Respondent /Claimant**
- and -	
1)BENJAMIN CHURCHILL **2)OUMAR DIALLO** **3)ZAKI MOHAMMED NUSEIBEH** **4)IR RELATIONS LTD** **5)FATOUMATA DIALLO**	**Appellants/ Defendants**

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Thomas Elias & John Eldridge (instructed by **Gunnercooke LLP**) for the **Appellants**
Nigel Jones KC & Oliver Hyams (instructed by **Lewis Silkin LLP**) for the **Respondent**

Hearing dates: 28, 29 & 30th March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Tuesday 25th April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Males:

1. This appeal is concerned with a sum of US $1.1 million which the claimant says was dishonestly diverted from the party to whom it ought to have been paid. It is an oddity of the case that the claimant which seeks to recover this sum is not the party to whom it ought to have been paid, but a company whose 100% shareholder and sole executive director was complicit in what is alleged to have been its wrongful diversion.

2. In December 2016, March 2017 and June 2017 Reading Football Club made an early repayment in three tranches of a loan of US $22,374,000, together with a termination fee of US $2.2 million which was payable on early termination of the loan facility. The lender was a Cayman Islands company, Global Fixed Income Fund 1 Limited ("the Fund"). It was agreed between Mr Mutaz Otaibi, a director of the Fund, and the first three appellants (senior employees of the company responsible for managing the Fund's investment to whom I shall refer as "the Defendants", as the liability of the fourth and fifth appellants is dependent on theirs) that the termination fee would be split equally between a Cayman Islands company of which Mr Mutaz Otaibi was the sole shareholder ("FCM Cayman") and the Defendants' own corporate vehicle, the fourth appellant ("IRL", but then known as Floreat Investor Relations Ltd). Instructions were given to the Fund's solicitors, Burges Salmon LLP, to pay out the termination fee in this way and the payments were duly made. The share received by IRL was then divided equally between the Defendants.

3. The judge, Mr Justice Robin Knowles CBE, held that Mr Mutaz Otaibi was not authorised by the Fund to agree to the termination fee being dealt with in this way and that the Defendants had no right to receive this money. He said that the Defendants knew that Mr Mutaz Otaibi did not have authority on behalf of the Fund to make this agreement and that their conduct was dishonest. Accordingly he held the Defendants, together with IRL, jointly and severally liable to repay the sum of US $1.1 million (referred to in the judgment as "the Diverted Sum"), while the fifth defendant (Mr Diallo's wife and a joint holder of the personal bank account into which his share had been paid) was liable to repay the US $366,000 which she and her husband had received.

4. The judge held that there were various bases on which the appellants were liable to repay the Diverted Sum. He held that the Defendants were liable for breach of fiduciary duties owed to the Fund, for dishonest assistance in a breach of fiduciary duty by the claimant, Floreat Investment Management Ltd ("FIML"), the Fund's investment manager, and for the tort of conspiracy to injure the Fund by unlawful means; that the transfer of the Diverted Sum was not void in law, but the Fund had an equitable proprietary claim to the Diverted Sum or its traceable proceeds because the diversion of the monies from the Fund had been procured by the Defendants' fraud, so that the appellants held the money on a constructive trust for the Fund; and that they were personally liable for knowing receipt of funds traceable to a breach of fiduciary duty.

5. The claimant in the action and the respondent to the appeal is FIML which, on the judge's findings, was itself in breach of fiduciary duty to the Fund. FIML's sole shareholder and executive director was Mr Mutaz Otaibi, who agreed to the termination fee being dealt with as it was. FIML sues as the assignee of the Fund's

claim. The issue, therefore, is whether the Fund had (before its assignment to FIML) a good claim for the return of the US $1.1 million.

6. The appellants challenge the judge's conclusions. They submit, in summary, that:

(1) the Defendants were not liable for breach of fiduciary duties because they did not personally owe fiduciary duties to the Fund;

(2) they were not liable for dishonest assistance in a breach of fiduciary duty by FIML because (a) any such duty owed to the Fund by FIML was excluded by the terms of the Investment Management Agreement between the Fund and FIML, and (b) the judge was wrong to find that the Defendants were dishonest because they believed that the diversion of the US $1.1 million was merely a short cut to a contractual payment scheme which ought to have resulted in 50% of the termination fee being ultimately payable to them anyway;

(3) the Defendants were not liable for knowing receipt because their receipt and retention of their share of the termination fee was not unconscionable in circumstances where they were merely short cutting the contractual payment scheme;

(4) because there was no fraud and no breaches of fiduciary duties, there was no basis for any equitable proprietary claim against any of the appellants; and

(5) because the Defendants believed that 50% of the termination fee ought ultimately to have been paid to them pursuant to the contractual payment scheme, there was no basis for a conclusion that they intended to harm the Fund so as to render them liable in the tort of conspiracy.

7. The Defendants also point to the fact that it took the judge almost seven months to produce his judgment and that towards the end of that time a number of promises that the judgment was imminent proved to be wrong, suggesting that there was disruption in the final stages of its production. They submit that this delay and disruption should make us more ready to review the judge's conclusions critically than might otherwise be the case.

8. By a Respondent's Notice the respondent claimant advances further arguments for concluding that the Defendants owed fiduciary duties to the Fund and that the Fund had a proprietary claim to the termination fee, and submits that fiduciary duties were owed, not only by FIML but also by Floreat Capital Markets Ltd ("FCM London"), the Defendants' employer, to which FIML delegated the management of the investment. The respondent challenges also the judge's rejection of the existence of duties of care in tort on the part of the individual Defendants.

9. It seems to me that the critical issue is whether the judge was wrong to hold that the Defendants acted dishonestly. If that finding stands, so that the Defendants dishonestly diverted the Fund's money to themselves, it would be surprising if by one route or another they were not liable to repay it. On the other hand, given the way in which the case was pleaded and argued at trial, if the judge was wrong to hold that the Defendants acted dishonestly, much of the case against the appellants would fall away.

The facts

10. The trial lasted 11 days and the judgment extends to 500 paragraphs over 92 pages. However, for the purpose of this appeal the following relatively brief summary is sufficient.

The Fund

11. The Fund is a Cayman Islands company which raised capital by the private placement of shares offered through an Offering Memorandum dated August 2015. Its objective was to create a portfolio of loans and investments generating a net income sufficient to support a target 5% per annum preference dividend payable to shareholders. It was directed to what was described as a limited number of sophisticated investors. The Offering Memorandum explained that costs and expenses would be met by the Investment Manager (FIML) out of its own resources and that the Investment Manager would not be paid a fee, but would enjoy any income of the Fund beyond that which was required to pay the 5% per annum preference dividend together with any repayment of principal.

12. I should draw attention to two aspects of the Offering Memorandum. The first is that it expressly contemplated that a fee might be payable on early repayment of a loan and provided that any such fee "will be added to the Fund's cash reserves to meet any shortfalls in income received or principal repaid". The judge called this "the Break Fee Clause". He found, however, that this did not mean that the termination fee had to be retained in the Fund's cash reserves for the entire life of the Fund. For the purpose of any issue as to the Defendants' knowledge, this provision can be disregarded. That is because the judge found that Mr Diallo was aware of it, but made no such finding in the case of Mr Churchill and Mr Nuseibeh; and because Mr Nigel Jones KC for FIML disavowed any distinction between the liability of the three Defendants.

13. The second is that the Offering Memorandum provided that:

> "In respect of each quarter, if the net income received from Loans and Investments exceeds the attributable Preference Dividend, any excess will be applied firstly in meeting any prior accrued but unpaid Preference Dividend. Any excess in the quarter (including any net income over an annualised 5% on the funds subscribed earned in the nine-month Preference Dividend holiday) of net income over the sum required to fund the Preference Dividend and after taking into account any impairment in the holding value of any Loan(s) or Investment(s) or any realised loss or shortfall following repayment or disposal, will be paid to the Manager in lieu of any other management or performance fee."

14. The judge described this as the "NAV Assessment Requirement", meaning that before any excess profit could be paid to FIML in respect of any quarterly period, a valuation of net assets at the close of that quarter had to be carried out by the Fund.

15. The Offering Memorandum was incorporated into the Subscription Agreement between the Fund and its investor shareholders, and thus set out the Fund's

contractual obligations to those shareholders. It referred to the Defendants, describing them as "experienced professionals with strong track records in investment …" and as partners and shareholders of FCM London, which would be the Investment Adviser to the Fund, responsible for advising the Investment Manager (FIML) and for arranging transactions to give effect to investment decisions made by FIML. The judge found that the reference in the Offering Memorandum to "partners" was an informal reference and that there was no legal relationship of partnership.

16. One of the directors of the Fund was Mr Mutaz Otaibi, who was described in the Offering Memorandum as a managing partner and CEO of the Floreat Group which had been founded by his brother, Mr Hussam Otaibi, to manage the wealth of the Otaibi family and one other family. He had extensive authority to act on behalf of the Fund. The other directors were Mr David Whitworth, a professional non-executive director with a background in fund administration, and Mr Christopher LeBeau of Maples Corporate Services Ltd, a representative of the Fund's Administrator. It is worth noting that Mr Whitworth was also the sole director of the Defendants' company, IRL.

Floreat Investment Management Ltd

17. As contemplated by the Offering Memorandum, the Investment Manager was FIML, appointed pursuant to an Investment Management Agreement dated 20th August 2015. Mr Mutaz Otaibi was a director (the only executive director) and the sole shareholder of FIML. By clause 3.1 of this agreement, FIML was to:

> "take all day to day decisions and otherwise act as the Manager deems appropriate in relation to the management of the Portfolio for the account of the Fund without prior reference to the Fund."

18. Clause 4.1 of the Investment Management Agreement provided that:

> "The Manager will, in lieu of any other fee, be entitled to retain: (i) in respect of the first nine months any excess in the net income over an annualised 5% on the funds subscribed and in respect of each subsequent quarter any excess in the Fund's net income over the amounts required to fund the Preference Dividend, including any accrued but unpaid, in each case after taking into account any impairment in the holding value of any Loan(s) or Investment(s) or any realised loss or shortfall following repayment or disposal …"

19. By clause 3.16 of the agreement, FIML was authorised to delegate the performance of its investment management services to any Associate, on terms that "any delegation or appointment pursuant to this clause 3.16 shall be entirely without prejudice to the Manager's liabilities, obligations and responsibilities hereunder and the Manager shall be responsible for the acts and omissions of its delegates as if they were its own".

Floreat Capital Markets Ltd (London)

20. FIML did delegate the performance of its services to FCM London, which fell within the definition of "Associate" in the Investment Management Agreement. It did so by means of an Investment Advisory Agreement dated 20th August 2015. The agreement provided that the services of FCM London would be provided by the Defendants as employees of FCM London, which was to be paid fees and expenses by FIML. By clauses 4.1 and 4.7, the fee payable to FCM London was to be paid "on a Loan-by-Loan (or Investment-by-Investment) basis" and "paid out of the Management Fee received by the Investment Manager [FIML] pursuant to the Investment Management Agreement in such amounts and at such times as the parties may from time to time agree". There was provision for a reference to the Fund's auditors (who would act as experts) in the event of any dispute about the fee.

21. FCM London was owned as to 50% by a company owned by Mr Mutaz Otaibi and others and as to the remaining 50% by the Defendants. Although there was a suggestion that a shareholders' agreement should be drafted, a final version was never achieved. Mr Mutaz Otaibi and Mr Diallo were directors.

22. In practice, however, payments were not made to FCM London, but to a Jersey registered company, Floreat Advisers Ltd ("FAL"), which was owned in the same way as FCM London. Presumably this was thought to have tax advantages for the shareholders of FCM London.

Floreat Merchant Banking Ltd

23. Floreat Merchant Banking Ltd ("FMB") was appointed by FIML as the Placement Agent pursuant to a Placement Agent Agreement dated 8th September 2015. Its duties were to promote shares in the Fund on a private placement basis. The agreement provided that FIML would pay an administration fee "on an investment-by-investment basis, in such amounts and at such times as the parties may from time to time agree". Mr Mutaz Otaibi was a director of FMB.

The Reading FC Loan

24. One of the transactions entered into by the Fund was the provision of financing to Reading FC pursuant to a Note Issuance Facility dated 8th December 2015. This provided that a termination fee would be payable to the Fund in the event of early repayment of any loan. The effect was that the Fund would receive in that event no less than three years' interest (or equivalent) under the facility. The interest rate payable by Reading FC was 8.5% per annum.

25. By October 2016 Mr Mutaz Otaibi was concerned about the ability of Reading FC to repay the loan and was anxious to achieve early repayment. He wanted to invest the proceeds in another profitable business. He instructed the Defendants to seek to achieve early repayment and, if necessary, to ignore recovery of any termination fee to which the Fund might be entitled. The judge found that Mr Mutaz Otaibi had authority to give those instructions on behalf of the Fund and that in circumstances where it was the Fund and not Reading FC which was pressing for early repayment, it would have been commercially unreal for the Defendants to have insisted on payment of the termination fee in full.

26. In the event the Defendants were able to achieve early repayment of the loan in three tranches, in December 2016, March 2017 and June 2017. No termination fee was sought or paid in respect of the first two of these repayments. If payment of a termination fee had been insisted on, Reading FC would not have made the repayments. These findings by the judge disposed of what was described as FIML's "Missing Termination Fee" claim, a claim that the Defendants had failed, in breach of their duties, to insist on payment of the full termination fee which was contractually due on early repayment.

27. However, the Defendants succeeded in achieving the payment by Reading FC of a termination fee of US $2.2 million together with the final repayment in June 2017, by which time Reading FC was in the course of being taken over by Chinese investors.

Diversion of the termination fee

28. The judge found that the Defendants decided as early as December 2016 to divert any termination fee paid by Reading FC without seeking the Fund's permission to do so and without informing the Fund's Board that they intended to act otherwise than in accordance with the loan facility, which required any such fee to be paid to the Fund. Contemporary documents from the period between December 2016 and June 2017 indicate a lack of candour on the part of the Defendants as to the existence, amount and proposed destination of any such termination fee. However, the judge did not find that the Defendants intended to take for themselves the entirety of any termination fee, only that they intended to ensure that they would receive 50% of any such fee.

29. In the event, however, they disclosed the existence and amount of the termination fee to Mr Mutaz Otaibi on 19th June 2017 and Mr Mutaz Otaibi agreed how the fee should be dealt with. This was that it should be paid in equal shares to FCM Cayman (owned by Mr Mutaz Otaibi) and IRL (owned by the Defendants).

30. The termination fee was actually paid by Reading FC to the Fund's solicitors, Burges Salmon, on 23rd June 2017. This payment discharged Reading FC's liability to the Fund. The money was held by Burges Salmon in their client account on trust for the Fund (*Target Holdings Ltd v Redferns* [1996] 1 AC 421, 436C).

31. Mr Nuseibeh (who was the individual authorised to give instructions on behalf of the Fund to its solicitors in relation to termination of the loan facility) then instructed the solicitors to pay US $1.1 million out of the termination fee of US $2.2 million to the Defendants' company, IRL, and the remaining US $1.1 million to FCM Cayman, Mr Mutaz Otaibi's company. Mr Jones described this as a "technical" breach of trust by Burges Salmon, but I would not accept this. It does not appear to have been part of FIML's case at trial that Burges Salmon acted in breach of trust and, in any event, they followed the instructions of the individual nominated on behalf of the Fund to give instructions as to the destination of the money.

32. IRL then transferred the US $1.1 million which it had received to the Defendants' personal bank accounts. The judge referred to this US $1.1 million as "the Diverted Sum".

Repayment by FCM Cayman

33. On 17th April 2019, only six days after the Fund had assigned its claim in relation to the termination fee to FIML, FCM Cayman paid to the Fund the share of the termination fee which it had received, together with interest. But then, on 12th June 2019, the Fund paid the same amount to FIML. Documents which FIML was ordered to produce in relation to these payments included the following:

(1) A memorandum from the Fund's Administrator to the Fund's Board dated 30th May 2019 which stated that:

> "Had the [Reading FC] Termination Fee been received by [the Fund] in June 2017, it would have been recorded as income… which would have constituted part of the Excess Income for the period, which would be paid the Manager [FIML]. As such, the amount of $1,201,279.63 received by [the Fund] will be recorded as an amount due and payable to [FIML]".

(2) A Board Resolution of the Fund dated 5th June 2019 noting that the payment to FCM Cayman in June 2017 had been made "in error" and referring to the money as an "Excess Amount" that "was and is payable to" FIML.

(3) A payment instruction signed by Mr Mutaz Otaibi and Mr Whitworth.

(4) The Fund's Audit Report for the year ending 31st December 2019, which stated that the money was "… excess amount available for distribution to [the] Investment Manager after payment of distributions to shareholders".

34. The Board Resolution makes clear that the payment to FIML was regarded as a matter of contractual obligation by the Board. Moreover, it is apparent that the Board saw no need to retain the repaid termination fee in its cash reserves or even to carry out a Net Asset Valuation at the end of the quarter before making the payment to FIML.

The judge's main findings

35. The judge structured his judgment by reference to FIML's written closing submissions, which included no fewer than 101 legal and factual findings which FIML invited the judge to make. He set out each of them, and then indicated that he was either able to make the finding, not able to make it, able to make it with some qualifications, or able to make it but doubted its relevance, although in some cases he did not explain the reasons for his conclusion.

36. It seems to me, with respect, that this approach was unfortunate. It had the effect of obscuring rather than clarifying the judge's own reasoning and factual findings, and has caused difficulty because of the ambiguity of some of the findings requested. An example is the requested finding that the Defendants had "at least constructive knowledge" of certain terms of the Offering Memorandum and therefore "ought to have known" that their diversion of the termination fee involved the Fund breaching its contractual obligations to its investor shareholders.

37. I would suggest that the submission of such a document is not a practice which is likely to be helpful in other cases and that, if a long list of requested findings is submitted, judges should not feel obliged to work their way laboriously through them

in this way rather than setting out their factual findings in their own words, with reasons where appropriate, in a clear narrative.

38. The most important findings made by the judge were as follows.

No profit share agreement

39. It was the appellants' case at trial that there was a profit share agreement whereby the Defendants would share the net profits of each transaction on a 50/50 basis with Mr Mutaz Otaibi and his associates. This agreement was not contained in any document, but was said to represent the parties' agreed understanding, and to have been agreed with Mr Mutaz Otaibi acting on behalf of the Fund, FIML and FCM. However, the judge rejected both versions of that case, one being that such an agreement had been concluded with "the Floreat Group" in 2013 and the other that it had been concluded in 2015 following the incorporation of the Fund and FIML. He held that the only agreement reached was as to the shareholding in FCM London, and that the Defendants' only entitlement over and above their salaries as employees of FCM London was to receive dividends payable on profits earned by the company:

> "62. What was agreed, and done, was to establish FCM London as a company in which the ownership was equally shared and from which dividends would be equally shared. Where FCM London achieved profit that benefit would be enjoyed equally by the two shareholding groups but only in the way that shareholders benefit from the success of a company in which they have shares. Profit would be after costs including salaries paid by FCM to Mr Churchill, Mr Diallo and Mr Nuseibeh. That is where the parties ended up, however they may have discussed it in initial negotiations and however the position may be confused by subsequent performance differing from what was agreed.
>
> 63. To the extent that the Defence suggests more than this, I do not accept it. …"

40. Thus FCM London was entitled to be paid fees by FIML and, to the extent that it made a profit after payment of (among other things) the Defendants' salaries, the directors might decide to declare a dividend. In that event the Defendants would share between them 50% of whatever dividend was paid, but would have no entitlement to any further profit share on transactions entered into by the Fund.

41. Although the Defendants drew substantial six-figure salaries, the contractual structure described above meant that their prospects of achieving any further benefits were heavily dependent on Mr Mutaz Otaibi. The Defendants evidently believed (although on the judge's findings with no sound basis for that belief) that they ought to share 50/50 in any profits achieved by the Fund in excess of those required to pay the 5% preference dividend to the Fund's shareholders. But they were concerned that Mr Mutaz Otaibi was in a position to "dilute" or frustrate what they regarded as their entitlement. Thus it was FIML, controlled by Mr Mutaz Otaibi, which was entitled to and would receive any excess profit paid out by the Fund, and Mr Mutaz Otaibi was in a position to pay some of that excess profit to FMB (effectively to himself and his

family) as the Placement Agent. Indeed, although the Defendants did not see it that way, FMB was entitled to a fee under the Placement Agent Agreement. FCM London was also entitled to receive a fee, but was dependent in practice on what could be agreed with Mr Mutaz Otaibi.

42. It was because the Defendants did not trust Mr Mutaz Otaibi to pay them what they regarded as their entitlement to 50% of the Reading FC termination fee that they decided to ensure that it would not reach the Fund's bank account for distribution to FIML, in whose hands it would be vulnerable to "dilution" before reaching FCM London. As the judge put it:

> "303. … Mr Churchill, Mr Diallo and Mr Nuseibeh were concerned that if the 'Diverted Sum' was sent to 'trickle down' from the Fund to FIML to FCM London there was a material risk that it would not reach the shareholders of FCM London."

43. The judge explained this more fully at a later stage of his judgment:

> "363. In the normal way, the Termination Fee that was sought and paid, of US$2.2 million, was payable contractually to the Fund as provider of the Financing under the Facility.
>
> 364. As between the Fund and its investors, in accordance with the relevant Offering Memorandum there would be a quarterly calculation to ascertain whether and what could be paid out after a return to investors which was fixed at 5% per annum.
>
> 365. Any sum that could be paid out would be a sum to which FIML was entitled, under the terms of the Investment Management Agreement. FCM London would be entitled to be paid by FIML fees agreed with FIML, under the terms of the Investment Advisory Agreement.
>
> 366. Mr Churchill, Mr Diallo and Mr Nuseibeh would expect to enjoy, beyond their salaries from FCM London, dividend payments from FCM London that reflected the payment of fees to FCM London which in turn reflected the payment of the Termination Fee to the Fund.
>
> 367. But Mr Churchill, Mr Diallo and Mr Nuseibeh had no confidence that they would be paid sums ultimately due to them, including their share of reward resulting from the Facility. They did not trust Mr Mutaz Otaibi.
>
> 368. By reason of their lack of confidence, and their distrust of Mr Mutaz Otaibi, Mr Churchill, Mr Diallo and Mr Nuseibeh acted to ensure that they received 50% of the Termination Fee, US $1,099,986.29, between them. The sum was first received by [IRL] and from there, US$366,000 was received by Mr Churchill, US$366,000 by Mr and Mrs Diallo, and US$366,050 by Mr Nuseibeh."

Informed consent

44. As I have already said, the judge found that Mr Mutaz Otaibi agreed to the diversion of the termination fee so that half of it was paid to the Individual Defendants' company, IRL, and the remaining half was paid to his own company, FCM Cayman.

45. The judge rejected FIML's primary case, which was that Mr Mutaz Otaibi only made this agreement because the Defendants deceived him as to the nature of the termination fee, falsely representing that it was some kind of extra-contractual bonus payment, not contractually due from Reading FC to the Fund, which therefore did not have to be dealt with in accordance with the contractual structure described above. The judge found that no such representation was made, that Mr Mutaz Otaibi understood the true nature of the termination fee, i.e. that it was payable by Reading FC to the Fund on early repayment of the loan pursuant to the terms of the loan facility, and that he made the agreement with that knowledge and understanding:

> "342. I do find that Mr Mutaz Otaibi knew that the [Reading FC] Payment was a Termination Fee due to the Fund. I also find that he gave informed consent to its diversion. …"

46. This finding transformed the landscape of the case. It meant that Mr Mutaz Otaibi and FIML were not the innocent victims of a fraud, as FIML had alleged. Instead they were complicit in what was agreed, to which they gave their informed consent.

The authority of Mr Mutaz Otaibi

47. However, despite his generally extensive authority to act on behalf of the Fund, Mr Mutaz Otaibi had no authority to agree to the diversion of the termination fee on behalf of the Fund:

> "342. I do find that Mr Mutaz Otaibi knew that the [Reading FC] Payment was a Termination Fee due to the Fund. I also find that gave informed consent to its diversion. Given his position with the Fund and FIML it was not open to him to agree to the diversion away from the Fund, and to the benefit of himself and others, of a payment that was being made and to which the Fund was entitled. He was not acting with the authority of the Fund's board."

48. There is no challenge to the conclusion that in agreeing to the diversion of the termination fee, Mr Mutaz Otaibi was not acting with the authority of the Fund.

49. However, Mr Mutaz Otaibi did have authority, as the 100% shareholder and sole executive director of FIML, to agree to the diversion of the termination fee on behalf of FIML.

The Individual Defendants' state of mind

50. There was no dispute that the Defendants knew that the party contractually entitled to receive the termination fee was the Fund. However, there was an issue whether they knew that Mr Mutaz Otaibi did not have authority to agree on behalf of the Fund to

the diversion of this money. It is necessary to examine closely what the judge said about this.

51. One of the findings sought by FIML was "Legal finding 6.10", which the judge set out as follows:

> "333. … Legal finding 6.10: [Mr Churchill, Mr Diallo and Mr Nuseibeh] could not reasonably have interpreted any act by the Fund as giving [Mr Mutaz Otaibi] authority to agree to the Fund not receiving the Payments in circumstances where they had at least constructive knowledge of the Break Fee Clause and the NAV Assessment Requirement in the Offering Memorandum, and therefore ought to have known that any such decision involved the Fund breaching its contractual obligations to its investor shareholders."

52. As is apparent from its terms, this was a request for a finding about how the Defendants could reasonably have interpreted the position, as distinct from how they did in fact interpret it; it was concerned with whether they had "at least constructive knowledge" of terms in the Offering Memorandum, but did not explain what more was encompassed by the words "at least"; and it invited a finding that they "ought to have known" that the diversion of the termination fee would involve the Fund breaching its contractual obligations to shareholders, as distinct from that they did in fact know this. The judge's finding, following the language of the request, was that:

> "334. I can accept Mr Churchill, Mr Diallo and Mr Nuseibeh had 'at the least constructive knowledge of the Break Fee Clause and the NAV Assessment Requirement in the Offering Memorandum'."

53. It is not clear what the judge meant by this. One problem with this finding is that, at an earlier stage of his judgment, he had made a finding of actual knowledge of the "NAV Assessment Requirement" on the part of all three Defendants, but had accepted a distinction (drawn by FIML) between Mr Diallo and the other two Defendants so far as the "Break Fee Clause" was concerned:

> "135. The Fund goes on to seek these findings:
>
> > 'Factual finding 6.6: [Mr] Diallo was, in fact, aware of the term of the Offering Memorandum requiring any Termination Fee or prepayment fees paid by [Reading FC] upon early repayment of the Loan to be retained in the Fund's cash reserves upon receipt ("Break Fee Clause").'
> >
> > 'Factual finding 6.7: [Mr Churchill, Mr Diallo and Mr Nuseibeh] were, in fact, aware of the terms of the [NAV] Assessment Requirement in the Offering Memorandum.'
> >
> > 'Factual/legal finding 6.8: [Mr Churchill, Mr Diallo and Mr Nuseibeh] ought to have known about the NAV Assessment Requirement and Break Fee Clause in the Offering

> Memorandum, because they were required to undertake [FCM London's] role as investment advisor to the Fund in accordance with the Offering Memorandum.'
>
> 'Legal finding 6.9: [Mr Churchill, Mr Diallo and Mr Nuseibeh] had constructive knowledge of the NAV Assessment Requirement and the Break Fee Clause in the Offering Memorandum.'
>
> 136. I am able to make findings 6.6, 6.7 and 6.9. If finding 6.8 is still required given those findings, I am able to accept the conclusion in finding 6.8. However, I am not able accept that Mr Churchill, Mr Diallo and Mr Nuseibeh were, as finding 6.8 puts it, 'required to undertake FCM [London]'s role as investment advisor to the Funding'. FCM London had the role of investment advisor to the Funding and was required to undertake that role; Mr Churchill, Mr Diallo and Mr Nuseibeh were its employees."

54. It seems rather odd to make a finding that someone has both actual and constructive knowledge of something. Unless the judge overlooked that he had already made a finding of actual knowledge of the "NAV Assessment Requirement" on the part of all three Defendants and of the "Break Fee Clause" in the case of Mr Diallo only, he must have been using "constructive knowledge" to mean something short of actual knowledge.

55. A second problem is that the judge, like FIML, did not explain what he meant by saying that the Defendants had "at least" constructive knowledge of these provisions. Unless he overlooked the earlier paragraphs, he cannot have meant that they had actual knowledge of the Break Fee Clause in the light of his distinction at [135] and [136] between the knowledge of Mr Diallo on the one hand and Mr Churchill and Mr Nuseibeh on the other. But it is hard to know what halfway house between actual and constructive knowledge the judge had in mind in accepting the formulation proposed by FIML, which was itself unexplained.

56. The judge went on, in his discussion of requested Legal finding 6.10, to distinguish between the Missing Termination Fee claim and the claim to recover the Diverted Sum. As to the latter, he said that:

> "338. On the other hand, I am able to make finding 6.10 in relation to the Termination Fee, including what the Fund describes as the 'Diverted Sum', in this way. Mr Churchill, Mr Diallo and Mr Nuseibeh could not reasonably have interpreted any act by the Fund as giving Mr Mutaz Otaibi authority to agree to the Fund not receiving the Termination Fee that was to be paid, and to someone else receiving it instead, in circumstances where Mr Churchill, Mr Diallo and Mr Nuseibeh knew that the right to the Termination Fee was the Fund's."

57. The judge returned to the question of the Defendants' knowledge of Mr Mutaz Otaibi's want of authority to agree to the diversion of the termination fee at a later

stage of his judgment, under the heading of "Dishonesty". I should set out the whole passage, although some of it has already been quoted above:

> "363. In the normal way, the Termination Fee that was sought and paid, of US$2.2 million, was payable contractually to the Fund as provider of the Financing under the Facility.
>
> 364. As between the Fund and its investors, in accordance with the relevant Offering Memorandum there would be a quarterly calculation to ascertain whether and what could be paid out after a return to investors which was fixed at 5% per annum.
>
> 365. Any sum that could be paid out would be a sum to which FIML was entitled, under the terms of the Investment Management Agreement. FCM London would be entitled to be paid by FIML fees agreed with FIML, under the terms of the Investment Advisory Agreement.
>
> 366. Mr Churchill, Mr Diallo and Mr Nuseibeh would expect to enjoy, beyond their salaries from FCM London, dividend payments from FCM London that reflected the payment of fees to FCM London which in turn reflected the payment of the Termination Fee to the Fund.
>
> 367. But Mr Churchill, Mr Diallo and Mr Nuseibeh had no confidence that they would be paid sums ultimately due to them, including their share of reward resulting from the Facility. They did not trust Mr Mutaz Otaibi.
>
> 368. By reason of their lack of confidence, and their distrust of Mr Mutaz Otaibi, Mr Churchill, Mr Diallo and Mr Nuseibeh acted to ensure that they received 50% of the Termination Fee, US $1,099,986.29, between them. The sum was first received by [IRL] and from there, US$366,000 was received by Mr Churchill, US$366,000 by Mr and Mrs Diallo, and US$366,050 by Mr Nuseibeh.
>
> 369. That money was due to the Fund, and Mr Churchill, Mr Diallo and Mr Nuseibeh knew it. Yet they decided to take it and keep it.
>
> 370. Of course, a share of reward as a result of the Termination Fee might have reached Mr Churchill, Mr Diallo and Mr Nuseibeh in time and due course, but that would be when and if (and to the extent) FIML was obliged to pay money to FCM London, and FCM London in turn declared dividends to its shareholders. Mr Churchill, Mr Diallo and Mr Nuseibeh arranged for half the money to be received and enjoyed by them regardless, and not to go to the Fund or to FIML for the Fund.

> 371. Indeed they also proposed and arranged for the other half of the US$2.2 million to go to a destination that was to Mr Mutaz Otaibi's personal financial benefit, i.e. FCM Cayman.
>
> 372. Mr Churchill, Mr Diallo and Mr Nuseibeh appreciated that the Fund had not agreed to this treatment of the US$2.2 million. They further appreciated that Mr Mutaz Otaibi's authority, considerable though it was, did not extend to allow him to treat assets of the Fund as his own to apply to his advantage or give away for his own purposes. They knew it was outwith the Instructions because it was not necessary for the US$2.2 million to be treated in this way in order to achieve early repayment of the Financing.
>
> 373. I find that the conduct in this area of Mr Churchill, Mr Diallo and Mr Nuseibeh was not honest."

58. There is here a finding of knowledge on the part of the Defendants that they "appreciated that the Fund had not agreed to this treatment of the US $2.2 million". It was because of this that the judge concluded that the Defendants had been dishonest.

What would have happened?

59. The Defendants submitted that if the termination fee had been paid to the Fund, as it should have been, it would immediately have been paid out to FIML as profit in excess of the amount needed to fund the 5% preference dividend and would have been available to be distributed between them and Mr Mutaz Otaibi. They relied on what had in fact happened in 2019 when FCM Cayman repaid its share of the termination fee as powerful evidence supporting this. However, the judge expressly rejected this submission:

> "350. … the Defendants contend that if the so-called 'Diverted Sum' (or any other fee) had been paid to the Fund in June 2017, it would immediately have been paid out to FIML as profit ('excess') and available to be distributed between 'the JV partners'. …
>
> 351. Viewed as at June 2017 I cannot accept that this is what would have happened, and I note that the Defendants did not believe it at the time. It was precisely because of their material concern that this would or might not happen that they took the steps they did to route half the sum of the termination payment to themselves directly.
>
> 352. In addition I do not have confidence in the reliability of the documents as at 2019, and would not be prepared to accept what they say without examination of underlying material and a full explanation of the Fund's financial position from 2017 to 2019."

60. It appears that in rejecting at [351] the submission that "this is what would have happened" the judge was eliding two distinct points. What the Defendants were saying was that the termination fee would have been paid out to FIML so as to be *available* for distribution. That was what concerned them. The concern was that when the money reached FIML, FIML would "dilute" what they regarded as their entitlement to 50% of the fee. They were not concerned that the Fund would retain the money.

61. More fundamentally, I consider that the judge could not fairly conclude that the termination fee would have been retained by the Fund in 2017 rather than being paid out to FIML. The fact that it was paid out in 2019, when the payment to FIML was regarded by the Fund's Board as a matter of contractual obligation to FIML, with no requirement for any quarterly net asset valuation, is indeed powerful evidence of what would have happened in 2017. There was no evidence that the Fund would in fact have retained the money. The judge's two reasons for rejecting this evidence do not withstand scrutiny. The first, that the Defendants were concerned "that this would or might not happen", misunderstands the nature of the Defendants' concern, which was that the money *would* be paid out to FIML, as I have already explained, not that it would not be. The second, that it was necessary to examine the Fund's financial position from 2017 to 2019, overlooks the fact that FIML had fought tooth and nail to resist giving disclosure of the 2019 documents, and that it was FIML and not the Defendants which had access to any underlying documents of the Fund which might have suggested that in 2017 the position would have been different. But no such documents, or any other evidence to that effect, had been adduced. This is, therefore, one of those rare cases where this court can and should reverse a finding by the trial judge (*Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [67]).

62. It is debatable whether, if the termination fee had been paid to the Fund in 2017, the Fund's Board would have carried out a quarterly valuation of net assets before paying the termination fee to FIML. The fact that no such valuation was carried out in 2019 strongly suggests that it would not. However, even if a valuation had been carried out, there is no reason to doubt that the termination fee would have been regarded as excess profit payable to FIML. FIML (which had access to the Fund's documents and records pursuant to the terms of the assignment) adduced no evidence to call this into question. Equally, there is no reason to suppose, and FIML adduced no evidence to suggest, that the Fund would have retained the termination fee to meet shortfalls in income received or principal repaid pursuant to the Break Fee Clause (see [12] above). At most, therefore, there would have been a very minor delay before payment of the termination fee to FIML.

63. Although the judge was not prepared to make this finding, in my judgment the conclusion that the termination fee would have been paid out to FIML is unavoidable. This too is an important conclusion. It means that the Fund would never have retained the termination fee, and that it was FIML, not the Fund, which was entitled to it under the contractual scheme which had been adopted.

Dishonesty

64. It was in the light of these factual findings that the issue of dishonesty had to be considered. For the appellants, Mr Thomas Elias submitted, in summary, that the

judge had failed to apply properly the correct test in law for dishonesty; that he had mischaracterised the situation in holding at [372] that Mr Mutaz Otaibi's authority "did not extend to allow him to treat assets of the Fund as his own to apply to his advantage or give away for his own purposes"; that he had failed to give proper reasons for his critical finding at [372]; and that he was wrong to find, in circumstances where Mr Mutaz Otaibi's authority *did* extend to waiving the right to receive any early repayment or termination fee on behalf of the Fund, that it was obvious that his authority did not extend to dealing with any termination fee which Reading FC did agree to pay. Mr Elias submitted that what had happened was no more than a "contractual short cut" which the parties had taken – in effect, an agreement that the termination fee need not be paid to the Fund but should be treated as if paid to FIML, and would then be paid onwards to companies representing Mr Mutaz Otaibi's interests (FCM Cayman) and those of the Defendants (IRL).

65. For FIML, Mr Jones supported the judge's conclusion, submitting that, having conducted the trial and seen the Defendants give evidence, the judge had been entitled to find them dishonest.

The test for dishonesty

66. It is true that the judge did not identify in terms the legal test required for a finding of dishonesty, but this is not surprising as there was no dispute about it. The authorities, from *Royal Brunei Airlines Sdn Bhd v Tan* [1995] AC 378 to *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391, were reviewed by this court in *Group Seven Ltd v Nasir* [2019] EWCA Civ 614, [2020] Ch 129, and there is no need to repeat that exercise. As Lord Hughes put it in *Ivey* at [74] and as was confirmed in *Group Seven*:

> "74. … When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

67. Applying this approach, the first step is to ascertain the Defendants' actual knowledge and belief. Once that has been ascertained, the next step is to decide, applying the standards of ordinary decent people, whether their conduct was honest or dishonest.

Did the judge give sufficient reasons?

68. In my judgment the judge's reasons for finding the Defendants to have acted dishonestly are sufficiently clear. His reasoning in the passage at [363] to [372] of his judgment set out above was that the Defendants knew that the termination fee should

have been paid to the Fund; they knew that the Fund had not agreed (because Mr Mutaz Otaibi did not have authority to do so) that it should be diverted; but, as he said at [369], they decided to divert it anyway. The judge considered that this was dishonest. However, as I shall explain, this reasoning did not take account of the full picture as it appeared to the Defendants.

The Defendants' subjective knowledge and belief

69. The first question is whether the Defendants knew that Mr Mutaz Otaibi did not have authority on behalf of the Fund to agree to the termination fee being divided between FCM Cayman and IRL. If they knew this, they were agreeing with him to divert away from the Fund money which ought to have been paid to the Fund.

70. The key paragraph of the judgment on this question is [372]. For ease of reference I set it out again:

> "372. Mr Churchill, Mr Diallo and Mr Nuseibeh appreciated that the Fund had not agreed to this treatment of the US$2.2 million. They further appreciated that Mr Mutaz Otaibi's authority, considerable though it was, did not extend to allow him to treat assets of the Fund as his own to apply to his advantage or give away for his own purposes. They knew it was outwith the Instructions because it was not necessary for the US$2.2 million to be treated in this way in order to achieve early repayment of the Financing."

71. The first sentence contains a finding that the Defendants appreciated that the Fund had not agreed to the proposed treatment of the termination fee. On its face that is a finding of fact by the trial judge who saw and heard each of the Defendants give evidence over several days, which he was entitled to make. It is a finding of actual and not merely constructive knowledge and in my view is not tainted by the unhelpful earlier discussion of constructive knowledge at [338] in the context of requested Legal finding 6.10, which I have discussed above. I would agree that if [372] were no more than a finding of constructive knowledge, it would not sustain a finding of dishonesty, the burden being on FIML to prove that the Defendants were dishonest. But that is not how I read the paragraph.

72. It is true that the second sentence of [372] appears to be intended to add something ("They further appreciated …"), although it is not entirely clear what the judge had in mind. In one sense, it is obvious that Mr Mutaz Otaibi did not have authority to treat the assets of the Fund as his own, but it is a mischaracterisation of what occurred to suggest that he was "giving away" the Fund's assets "for his own purposes". Rather, he was agreeing to short circuit a process whereby the termination fee was payable to the Fund, but the Fund would then be contractually obliged to pay it out to FIML, a company of which he was the 100% shareholder and sole executive director. To the extent that the termination fee was an "asset of the Fund", it was an asset which the Fund had a right to receive, but not to retain. The entity to which it was ultimately payable was his own company, FIML. Accordingly, looking at the position overall, it is not fair to say that Mr Mutaz Otaibi was "giving away" the Fund's assets.

73. Thus the Defendants knew that the termination fee was payable to the Fund and that the Fund had not agreed to its diversion. That is a first step in any consideration whether they were acting dishonestly. But it was only part of what they knew and believed. They also knew that the Fund was profitable, with sufficient funds to pay the 5% preference dividend, and that it therefore had no right to retain the termination fee. On the contrary, it had a contractual obligation to pay the money once received (and, if necessary, once a quarterly valuation had been carried out) to FIML. As between the Fund and FIML, it was FIML which was entitled to the money. But FIML had agreed (in the person of Mr Mutaz Otaibi) that it should be divided between FCM Cayman and IRL. Accordingly the diversion of the money can properly be regarded as a contractual short cut.

Objective dishonesty

74. The judge never asked himself whether, once this full picture was considered, the Defendants' conduct was dishonest according to the standards of ordinary decent people. In my judgment, however, their conduct may have been ill-advised (as the Defendants now accept), but it was not dishonest. Dishonesty involves a serious lapse from ordinary and proper standards and should not lightly be found, particularly against a background in which, as the judge found at [326], a degree of slackness in complying with formalities was "not out of the norm for the Floreat Group". Indeed the Fund's Board was informed at a meeting on 23rd November 2017 that a termination fee of approximately US $2 million had been negotiated in favour of the Fund. The other directors present did not suggest that the way in which this payment had been dealt with was in any way improper or challenge Mr Mutaz Otaibi (who was present) about it.

75. It is notable also that Mr David Whitworth was a director, not only of the Fund, but also of IRL, and that the Defendants made no attempt to conceal the destination of the termination fee from the Fund's solicitors. If the Defendants were acting dishonestly towards the Fund, it is surprising that they caused their share of the termination fee to be paid by the Fund's solicitors to a company of which a director of the Fund was also a director and made no attempt to cover their tracks. Moreover, when FCM Cayman repaid its share of the termination fee to the Fund in 2019, the Fund's Board regarded the initial payment to FCM Cayman in 2017 as having been made "in error".

76. This is not surprising. The Fund had not lost out as a result of the agreement to divert the money. If anyone was a "victim" of this agreement, it was FIML (which would have been entitled to it if it had been paid to the Fund) and not the Fund (which contractually and in practice was merely a conduit for payment of the money to FIML). But on the judge's findings, FIML was not a victim at all. On the contrary, it had agreed to the diversion with full knowledge of the position ("informed consent" as the judge described it at [342]) on the part of Mr Mutaz Otaibi, its 100% shareholder and sole executive director.

The consequences of finding that the Defendants' conduct was not dishonest

77. As I noted at the outset, once it is recognised that the judge was wrong to find that the Defendants acted dishonestly, and in particular that the payment away from the Fund of the termination fee reflected FIML's contractual entitlement to it, a central part of the various causes of action asserted by FIML falls away.

78. Self-evidently, in the absence of a finding of dishonesty, the Defendants cannot be liable for dishonest assistance to a breach of fiduciary duty by FIML or FCM London (see also *Group Seven* at [58]). Likewise, because the judge's finding that the Fund retained equitable title and thus had a proprietary claim to the Diverted Sum was dependent upon his finding that the Defendants had procured its diversion by fraud, the proprietary claim must also fall away.

79. Further, once it is recognised that the Fund could not have retained the termination fee, but would have been under a contractual obligation to pay it out to FIML, the retention of the termination fee by the Defendants could not be said, as against the Fund, to be unconscionable so as to support a claim by the Fund in knowing receipt. It is also apparent that the Fund has suffered no loss as a result of any breach of duty, whether fiduciary or in tort, which may have occurred. The only party capable of having suffered any loss as a result of the diversion of the termination fee was FIML, but FIML agreed to its diversion.

80. It is therefore unnecessary to extend this judgment by considering in detail the various causes of action on which FIML relied, including whether the Defendants personally owed duties to the Fund, whether fiduciary or in tort. I would note, however, with particular relevance to the claim for knowing receipt and the equitable proprietary claim, both of which are dependent upon showing breach of a fiduciary duty owed to the Fund, that the contractual structure put in place was careful to circumscribe the fiduciary duties which might otherwise have arisen.

81. Thus the Investment Management Agreement between the Fund and FIML expressly permitted FIML to act in circumstances in which it had a material interest or a relationship with another party which might involve a conflict with its duty to the Fund and provided that FIML's duty in such a case was merely to take reasonable steps to ensure that the Fund was treated fairly (clause 5.1). It provided also that the services to be provided by FIML would not prevent or hinder FIML, in transactions with or for the Fund, from acting as both principal and agent of the Fund (clause 5.5). The agreement further provided that FIML would not be liable for any loss suffered by the Fund, save to the extent that such loss arose directly as a result of the "actual fraud, Gross Negligence [a defined term which, broadly speaking, meant recklessness] or wilful default" of FIML or its officers or employees, and that even in such a case its liability would be limited to no more than US $5 million (clause 10.1). Finally, the agreement spelled out that the only duties or obligations owed by FIML were those set out in the agreement or arising under any applicable statute, law or regulation to which FIML was subject and that FIML owed the Fund no other duties, whether arising from the fact that it was acting as the Fund's fiduciary or otherwise (clause 13).

82. On the face of it, the restricted duty upon FIML to take reasonable steps to ensure that the Fund was treated "fairly" was not breached by the payment away of monies which the Fund was contractually obliged to pay to FIML in any event. Alternatively, in the absence of dishonesty, FIML would be excused from liability under clause 10.1.

83. In circumstances where the duties undertaken by FIML were carefully limited in this way, there is in my view also no scope to conclude that FCM London or the individual Defendants undertook unlimited fiduciary duties to the Fund. As explained in cases such as *Bristol & West Building Society v Mothew* [1998] 1 Ch 1 and *Al*

Nehayan v Kent [2018] EWHC 333 (Comm), [2018] 1 CLC 216, outside established categories of fiduciary relationship, the existence of fiduciary duties depends upon an agreement to act in the interests of another person when exercising power or making discretionary decisions and requires the fiduciary to act unselfishly in the best interests of the principal.

84. Just as any fiduciary relationship must accommodate itself to the terms of any contract between the parties (*Hospital Products Ltd v United States Surgical Corp* (1984) 55 ALR 417, 454-455), so too the terms of any contract between the principal and the primary fiduciary (i.e. FIML) will be at least highly relevant to the question whether fiduciary duties are undertaken by secondary parties not in a direct contractual relationship with the principal. If the primary fiduciary's liability is limited to cases of "actual fraud, Gross Negligence or wilful default", it is implausible to suggest that other parties who are engaged to perform the functions of the primary fiduciary should undertake a more extensive responsibility.

85. The Defendants in this case had no direct contractual relationship with the Fund, but were employees of FCM London, the company to which FIML had delegated the performance of its duties under the Investment Management Agreement. While I would accept that FIML's duties included some duties of a fiduciary nature, the extent of those duties was carefully limited. It is not difficult to accept that FCM London and the Defendants undertook a duty to act honestly when dealing with the Fund's assets and investments, but I would not accept that they undertook any further or more extensive duties of a fiduciary nature.

86. For completeness I should also deal with FIML's contention that an equitable proprietary claim by the Fund can be upheld on the alternative basis that the payment of the Diverted Sum from Burges Salmon's client account to IRL was a breach of trust which did not extinguish the Fund's equitable interest in those monies because the Fund had not agreed to IRL having the money. That contention cannot succeed in the absence of any allegation that Burges Salmon were acting in breach of trust in making the payment on the instructions of the person authorised to give them such instructions. It must also fail by reason of the conclusion that FIML owed strictly limited fiduciary duties to the Fund and the Defendants owed no fiduciary duties to the Fund other than to act honestly, together with the absence of any allegation that FIML (by Mr Mutaz Mutaibi) was acting dishonestly, or any sustainable finding that the Defendants were doing so either.

Delay and disruption

87. As explained in *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408, [2020] 4 WLR 55 at [78] to [84] and *Dansingani v Canara Bank* [2021] EWCA Civ 714 at [85], the general rule is that a judgment in the Business and Property Courts should be delivered within three months of the hearing. Where, as in this case, there is delay beyond this time, it will be appropriate to scrutinise the judgment with particular care, and an appellate court may be more ready to conclude that the judge has gone wrong. However, as Mr Elias recognised, delay is not itself a reason for allowing an appeal.

88. In this case I have concluded that the judge has gone wrong, in particular in failing to consider the full picture so far as concerned the knowledge and belief of the

Defendants when agreeing with Mr Mutaz Otaibi to divert the termination fee. It is therefore unnecessary to say anything further about this aspect of the case.

Conclusion

89. I would allow the appeal and would set aside the judge's order. There should be judgment for the appellants.

90. Standing back from the detail, it seems to me that this is the just result. If the Defendants did act dishonestly, it is difficult to avoid the conclusion that Mr Mutaz Otaibi was equally dishonest. After all, he was a director of the Fund itself, closely involved in every aspect of this contractual structure, and was found by the judge to have given his informed consent to the diversion of the termination fee. But the Fund has never made any claim against him, and he was put forward in this action as an honest witness who was deceived by the Defendants' false representations, a claim which the judge rejected. In effect, Mr Mutaz Otaibi's company brings this action to undo the agreement to split the termination fee 50/50 which he himself made with the Defendants. In those circumstances an outcome in which the entirety of the termination fee ends up in the hands of his company, FIML, is to say the least somewhat counter-intuitive.

Lord Justice Snowden

91. I agree.

Sir Launcelot Henderson

92. I also agree.